

PHAM (Migration) [2020] AATA 2534 (16 April 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Ngoc An Pham

VISA APPLICANT: Ms Thi Huynh Trang Pham

CASE NUMBER: 1808363

DIBP REFERENCE(S): BCC2017/1641232

MEMBERS: De-Anne Kelly (Presiding)
Fiona Meagher

DATE: 16 April 2020

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 16 April 2020 at 10:40am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – inconsistent evidence – date, place and manner of proposal – where the parties stayed and when – financial aspects – nature of household – social aspects – absence of statutory declarations or letters of support from family or friends – nature of commitment – visa applicant’s use of ex-husband’s address – vague and general future plans – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 25 January 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant, Ms Thi Huynh Trang applied for the visa on 8 May 2017 on the basis of her relationship with her sponsor, the review applicant, Mr Ngoc An Pham. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211, because they did not consider that the applicant met cl.309.211 of Schedule 2 to the Regulations as they were not satisfied the applicant and sponsor were in a genuine spousal relationship as required.
5. The review applicant appeared before the Tribunal on 5 December 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Pham, the visa applicant. There was a further hearing on 29 January 2020, at which both the review applicant and visa applicant gave evidence. The Tribunal was assisted by an interpreter in the Vietnamese and English languages on both occasions.
6. The review applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the visa applicant was, at the time of the visa application, the spouse of the sponsor, and remains the spouse of the sponsor at the time of the making of this decision.
9. **Evidence before the Tribunal**
10. The Tribunal had before it documents provided to the Department including as follows:
 - Form 40 SP for Mr Pham.
 - Form 47 SP for Ms Pham.
 - Australian Federal Police certificate for Mr Pham.
 - Certificate of Australian citizenship for Mr Pham.
 - Divorce order for Mr Pham and Ms Thi Bich Phuong Ngo dated 9 May 2015.
 - Application to certify the loss of personal assets from Mr Pham dated 8 February 2017, and identifying a temporary residential address.
 - Certificate of marriage dated 6 February 2017 between Ms Pham and Mr Pham.

- Decision to settle the marriage and family case or divorce papers dated 21 March 2014 between Ms Pham and Mr Phan The Thanh.
- The judicial curriculum vitae for Ms Pham dated 17 February 2017 and showing her residential address.
- Summary of 'judicial curriculum vitae' for Ms Pham dated 9 February 2017.
- Sojourn register for Ms Pham dated 16 February 2017.
- Family household register for Ms Pham dated 6 July 2016.
- Vietnamese passport for Ms Pham, date of issue 27 March 2014.
- The People's ID card for Ms Pham dated 24 February 2014.
- Extract of the birth registration for Ms Pham dated 13 February 2017.
- Statement by Mr Pham dated 12 February 2017.
- Statement by Ms Pham dated 12 February 2017.
- Partner visa interview on 24 November 2017 with Ms Pham and delegate of the Minister.
- Notification of refusal of application for a Partner (provisional) (Class UF) (Subclass 309)/Partner (Migrant) (Class BC) (Subclass 100) visa.
- Passport photos stapled to the same A4 sheet of paper, of Mr Pham and Ms Pham.
- Additional phone interview regarding household registration booklet apparently dated 6 December 2017 between delegate of the Minister and Ms Pham.
- Bundle of photographs showing the couple in various social settings in Vietnam.

11. In addition documents were provided to the Tribunal including:

- Covering letter from Mr Tam Nguyen, the registered migration agent.
- Statutory declaration by Mr Pham dated 27 November 2019.
- Statutory declaration signed by Mr Pham dated 11 December 2019.
- Translation of receipt for accommodation at Hoi An hotel for Mr and Ms Pham from 25 to 28 April 2018.
- Hand-written receipt from Hoi An hotel on writing paper with Hoi An stamp.
- Translation of receipt for accommodation at Hoi An hotel for Mr and Ms Pham from 17 to 21 May 2018.
- Handwritten receipt from Hoi An hotel on writing paper with Hoi An stamp.
- Hospital certificate dated 18 January 2016 for Mr Pham Ngoc Tuan.
- Optus phone bills for Mr Pham from:
 - 11 November to 10 December 2016.
 - 11 March to 10 April 2017.
 - 11 April to 10 May 2017.
 - 11 May to 10 June 2017.
 - 11 June to 10 July 2017.
 - 11 July to 10 August 2017.

- 11 August to 10 September 2017.
- 11 September to 10 October 2017.
- 11 November to 10 December 2017.
- 11 January to 10 February 2018.
- 11 February to 10 March 2018.
- 11 March to 10 April 2018.
- 11 April to 10 May 2018.
- 11 May to 10 June 2018.
- 11 July to 10 August 2018.
- 11 August to 10 September 2018.
- 11 October to 10 November 2018.
- 11 December 2018 to 10 January 2019.

12. The review applicant also provided the Tribunal with a copy of the delegate's decision.

13. On 16 January 2020, the following documents were provided:

- Covering letter from the registered migration agent, dated 16 January 2020 and listing documents attached.
- Statement by the visa applicant's daughter regarding the relationship.
- Two money transfer receipts for monies transferred from the review applicant to the visa applicant dated December 2019 for \$386 and 5 January 2020 for \$382.
- Optus phone bills for the review applicant for the period January 2019 to December 2019.

14. The Tribunal has carefully considered all the relevant evidence before it including the documents referred to above.

15.

16. **Background**

17. The visa applicant was born in Vietnam on 5 January 1968 and is now 52 years of age. For many years she ran Dat Café in My Tho. She was previously married in 1995 and divorced on 21 March 2014 and has a 27-year-old daughter who is not included in this application. She now works at IBASIC in Ho Chi Min City as it provides her with a regular monthly salary unlike working in the café, which gave her cause for worry and did not produce a great deal of income. From before the inception of the relationship she claims to have lived at the café. Since obtaining the job in Ho Chi Minh City the visa applicant claims to have lived in Ho Chi Minh City.

18. The review applicant was born in Vietnam on 16 June 1951 and is now 68 years of age. He came to Australia in 1988 with his first wife Ly Thi Be whom he married in 1979 and divorced in 1999. The review applicant has three children with his first wife: Pham Tien Dung, born 1981; Pham Thi My Nhu, born 1985; and Pham Tien Si, born 1988.

19. The review applicant married for a second time in 2000 to Ms Ngo Thi Bich Phuong, and applied for a partner visa for Australia for Ms Ngo that was refused. The couple divorced in 2015.

20. The review applicant lives in Inala, Brisbane.
21. The parties claim to have met through a mutual friend when the review applicant visited Vietnam in May 2016. They claim that their relationship developed from that point, over the telephone and through visits by the review applicant to Vietnam including to visit the visa applicant. They married in February 2017. The review applicant has, since the parties were married, made one additional visit to Vietnam to see the visa applicant.
22. The visa applicant claims to have been the spouse of the review applicant at the time of the visa application and claims that she continues to be the spouse of the review applicant now, such that she meets cl.309.211(2) and cl.309.221 of Schedule 2 to the Regulations as required.

Whether the parties are in a spouse or de facto relationship

23. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the visa applicant claims to be the spouse of the review applicant who is an Australian citizen by grant on 14 August 1995.
24. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

25. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The delegate's decision of 25 January 2018 states "I am satisfied that the applicant and the sponsor have legally married". On the evidence, namely a Marriage Certificate between the parties dated 6 February 2017, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

26. The evidence

27. The Review applicant, in a statutory declaration dated 12 February 2017, described the circumstances of his relationship with the visa applicant. After his divorce from his first wife he would return to Vietnam for 'pleasure' and after the second divorce he would still come back to Vietnam as 'I felt alone and wanted to have a family to be with, taken care of, to love'. He would talk to a local hotel owner in Vietnam and ask her to find 'for me, a genuine and good woman that I could co-habit and take care of each other'. On 12 May 2016 the hotel owner asked another person who was a good friend of the visa applicant to take the review applicant to the Dat Café and introduce the couple to one another.

28. The review applicant said that when he met his wife for the first time, he asked her about her matrimonial status, and stated that he proposed to her, or at least made a suggestion of marriage on that day. The Tribunal then asked the review applicant whether he proposed to the visa applicant or whether she proposed to him. He responded that he “actually proposed to her” but that first he had asked her about her marital status and that afterward she had asked him about his marital status. When the Tribunal sought further clarification as to whether it was a suggestion or a proposal the review applicant responded: “it’s more of a suggestion said [sic] ‘I want to propose to you will you agree?’” He also told the Tribunal, when asked if the visa applicant agreed, that she said that because she was already divorced if it works out, she would agree. When later asked how he had decided he wanted to marry the visa applicant, the review applicant said that he was attracted to her lovely personality and that she was softly spoken. He also said that he was getting old and weak and needed someone to look after him. He said that his children live far away from him and he did not want to die in his sleep alone. He said that if that happened no one would know.
29. The Tribunal later asked the review applicant questions about his children. He stated that his daughter lives in Melbourne, but that his two sons live in a suburb five minutes from his suburb. Furthermore he told the Tribunal that he visits them on the weekend and that one of his sons drove him to the hearing that day.
30. At hearing the review applicant stated that he slept at the café with the visa applicant on the night of 12 May 2016, the day they first met. He said that he then travelled back by coach to Ho Chi Minh City as they were not keen to let the neighbours know of their relationship. He returned to Australia on 6 June 2016. He provided a different version in his statutory declaration of 11 December 2019, in which he stated that he left the visa applicant on the same day to visit his siblings in Ca Mau Province. In the statutory declaration he explained that he had said that his recall at the hearing was affected by “extreme nerve and pressure” [sic] such that his mind and memory “seemed to lose out of control that I confused one matter to the other” [sic]. According to the review applicant’s statutory declaration of 12 December 2017 he kept in touch with the visa applicant by telephone after returning to Australia, and their conversations made him “joyful and happy”,
31. The review applicant left Australia a month later, on 7 July 2016, and spent three weeks in Vietnam, returning to Australia on 27 July 2016. On that visit, according to the statutory declaration of the review applicant dated 12 February 2017, the delegate’s decision, the statutory declaration of the review applicant provided prior to the first hearing dated 27 November 2019, and the statutory declaration of the review applicant provided after the first hearing and dated 11 December 2019, the visa applicant met him at the airport. From there the parties spent time together, undertaking some tourist activities, including visiting a famous bridge and a theme park, and meeting members of each other’s families, including the visa applicant’s mother and daughter, and his brother and sister and two nieces
32. The review applicant visited Vietnam six months later from 12 January to 15 February 2017. The review applicant stated this was a very hectic visit, and he sometimes stayed at the Dat Café with the visa applicant and sometimes in Ho Chi Minh City. They applied for the certificate of singleness at Dao Thanh and applied for the certificate of non-impediment to marriage for the review applicant from the Australian Consulate General. They went to the Justice Service in My Tho, Tien Gang to register for the marriage. He advised that a friend of the visa applicant named Quyen would mind the café while the visa applicant travelled with him.
33. It was during this visit that the couple were married, on 5 February 2017. The review applicant advised that the marriage took place at the visa applicant’s mother’s home, and that there were 50 guests, and he had paid AU\$1000 for the food and catering.

34. The review applicant told the Tribunal that his youngest brother who had suffered a stroke, and is semi-paralysed and his sister who cares for their brother had met the visa applicant many times, but that they were unable to attend the wedding due to his brother's ill-health and need for a carer..
35. The Tribunal observed that none of the review applicant's family members attended the wedding and have not provided statutory declarations or letters of support for him regarding the marriage. The review applicant advised that he had told his children on 7 July 2016 that he was marrying, and they were very happy for him. He said that they were unable to attend the wedding due to work commitments in Australia, and when asked why they had not written letters of support for him, he said that they did not have time.
36. The review applicant said that they had told the review applicant's daughter about their relationship during his second trip to Vietnam and she was very happy and smiling. The review applicant advised that his children had not spoken to the visa applicant as there was a language barrier since they spoke English and she spoke only Vietnamese. After further questioning the review applicant acknowledged that his children, and in particular his oldest child speak Vietnamese. He also told the Tribunal that his first wife, the mother of his children did not speak English, and only spoke Vietnamese, and changed his evidence to acknowledge that they spoke to her in Vietnamese. When the Tribunal raised this again with the applicant, he changed his evidence again. He acknowledged that two of his children lived with their mother and when asked how they communicated with her he said that they did not communicate with her very much at all, she just cooks for them. The Tribunal finds this explanation inconsistent and implausible.
37. The review applicant visited Vietnam eight months later, arriving on 12 October 2017 and departing on 9 November 2017. He advised that during this visit he and the visa applicant stayed at a hotel in Ho Chi Minh City rather than at Dat Café because the city is more vibrant, and they could more readily visit his nephews and the visa applicant's daughter.
38. The review applicant visited Vietnam six months later, to comfort the visa applicant after the visa had been refused, arriving on 25 April 2018 and departing on 22 May 2018. The review applicant advised that he has not returned to Vietnam since May 2018 because the couple are waiting for the application for review to be finalised by the Tribunal; airfares are expensive, and they want to save money towards a life together. He said that the parties stayed in regular contact by phone and that his wife works almost seven days a week which would allow them to have little time together.
39. The review applicant at the hearing, when asked why the visa applicant had continued to use her ex-husband's address on the Family Household register in 2016, some two years after her divorce, stated that the property was owned jointly and in joint names between visa applicant and her ex-husband and the property settlement had not been finalised at that time. Later the review applicant advised that the visa applicant and her ex-husband had agreed that the property would not be sold but kept as an asset for their daughter. On 1 January 2013, the visa applicant had already left the marital home and was living at the Dat Café because her husband had gone with another woman and the house was left vacant.
40. The review applicant told the Tribunal that he receives \$910 disability support pension and \$74 rental allowance a fortnight. He advised that the visa applicant earned 6.2 million Dong per month, or approximately AUD\$400 per month. He lives in a boarding-house with his own bedroom and a shared bathroom for a rental of \$110 a week plus electricity and other utilities. He said that he is generally in good health except for insomnia, high blood pressure and mild cholesterol problems. The review applicant said that his wife is aware of his health problems and attributes his insomnia to him missing her. His day starts at 6AM when he gets up and he goes to bed late at 11PM. He generally spends his time around the house

watching news programs most of the day and occasionally going shopping. He does his own cooking and on weekends he visits his children.

41. The review applicant said they had discussed where the visa applicant would live if she was successful with the application, and that initially she would share his bedroom and later they wanted a place of their own. He said she intend to apply for a job and look after him. When asked about the parties' plans in the event that they are unsuccessful in the application for the visa, and whether they had discussed that possibility, the review applicant responded that they would be very upset, they would not know what to do, but if they could not reunite they would have to accept it.
42. The review applicant advised that he speaks with the visa applicant on a daily basis and they discuss how she is coping and how long the wait will be until the visa is granted.
43. When asked about the reason for the refusal of the partner visa application for his second wife, Ms Ngo Thi Bich Phuong, the review applicant advised Ms Ngo Thi Bich Phuong had stated in the interview with the departmental officer that she did not intend to re-unite with the review applicant once she arrived in Australia. She got very angry with the review applicant after the refusal and would not speak with him anymore.
44. During the hearings, the Tribunal discussed particular information with the review applicant as follows:

45. *The proposal – date, place and manner of proposal*

46. The Tribunal had before it a statutory declaration made by the review applicant dated 27 November 2019. In that he stated as follows:

47. We as a couple introduced to our siblings and relatives and friends after our strong relationship from which we pledged to walk on family path, to commit to build a happy family with love, care of each other until one passing away on this earth planet. At our middle ages, in fact, we did not need to process the wedding like the young ones whose parents needs to be proud to celebrate big wedding and reception. We also made decision ourselves as our ages not approved by parents first.
48. The review applicant stated at the hearing that he proposed to the visa applicant on the morning he met her at the Dat Café, namely 12 May 2016. This was because she had a lovely personality and he had asked her about her matrimonial status. When further questioned by the Tribunal regarding his first meeting with the visa applicant, the review applicant stated that the initial discussion he had with the visa applicant about marriage was more like "a suggestion", and that the visa applicant had responded that "if it works out yes I will agree".
49. The visa applicant at the hearing advised that the review applicant proposed marriage to her on 15 January 2017 at her mother's house and asked permission of her mother for them to marry.
50. After hearing the evidence of the visa applicant, the Tribunal again asked the review applicant about the proposal, noting that there had been more than one version provided in relation to it. The Tribunal put this information to the review applicant, in accordance with the procedure set out in s.359AA of the Act, telling the review applicant that it had some information which would, subject to his comments or response, be the reason or part of the reason for affirming the decision under review to refuse to grant the visa. The Tribunal confirmed that it had not made up its mind, and explained to the review applicant that after it

explained the information to him he was entitled to seek additional time to comment upon or respond to the information, and if he wished to seek additional time he should ask and the Tribunal would consider his request. The Tribunal explained that it had concerns as to why the visa applicant and review applicant had different versions regarding the proposal, given its significance.

51. The review applicant responded that he had expressed his intention to marry his wife the first day he met her. He went on to say that on 12 January 2017 he and his wife travelled to her mother's house to notify her of their impending marriage.
52. The review applicant responded further in his statutory declaration dated 11 December 2019 as follows:

53. *First, I am here offering my apologies for the extreme nerve and pressure as the first time I was sitting down and facing the Tribunal Members. My mind and memory seem to lose out of control that I confuse from one matter to the other. I need to recall full story since I first met my wife to the marriage proposal and the wedding to clarify the events.*

54. *In fact, on 12 May 2016, the first time of meeting, I and Trang just exchanged some stories from which we understood both of us were living bachelor life after the divorce. I also express my intention of seeking a matching partner with whom I could progressively develop a relationship and possibly becoming spousal relationship. Then, I left Trang in the same day of 12 May 2016 to make a trip to Ca Mau Province to see my two young siblings: the young brother PHAM NGOC TRAN was under stroke since mid-January 2016 and his elder sister PHAM THI NGOC ANH, and other relatives.*

55. *I however via telephone managed communication with Trang to understand more during my staying in Vietnam until I left for Australia on 6 June 2016. I continue communicating with Trang to exchange a social, individual stories from which I express my sadness to live alone and I need a true partner to be my wife to live together under the same roof for love and care is for each other for the remaining of my life on this earth. Trang and I understood each other deeper. I promise to come back to see Trang to spend more time to understand further our personality to see if we could walk on family path in the future. Trang and I agreed to further discussion before we can make any decision.*

56. *I then made second trip to see and spend time with Trang. I arrived on 7 July 2016 and was picked up by Trang. We stayed in hotel and spent time around and visited famous places such as Dam Sen Park, Bang Dang and Star Light Bridge with photos taken for our souvenir. Trang and I understood further and our relationship was deeply develop to the level of our eyes in Isis loving expectation, can say we were ready to go ahead our relationship further, possibly a marriage as my proposal to marry Trang and she accepted on the night of 9th July 2016.*

57. *On the fourth day, 10 July 2016, I took Trang to visit my two siblings and relatives in Ca Mau. We had dinner together and I did introduce Trang to them with intention to ask her hand for my marriage. They were happy for the news and encouraged us to go ahead. Trang and I stayed in hotel during in Ca Mau.*

58. *On 20 July 2016 Trang and I returned Saigon to stay in hotel. On 21 July 2016 Trang took me to introduce to her mother, who is a Buddhist Nun at home, living in My Tho – the provincial capital of Tien Giang Province. Trang's mother warmly welcomed us and we stayed there for three days. During this time Trang and*

I notified her our intention to make decision to marry my proposal and Trang accepted.

59. The Tribunal accepts that the review applicant may have initially interpreted its questions regarding the proposal to encompass when he first canvassed marriage with the visa applicant, as opposed to when he formally proposed. It also accepts that the parties desire to marry may have developed, evolved and strengthened over time, and may even, to some extent, encompassed meeting each other's families, and letting them know of their intentions. These concepts are implicit in the review applicant's statutory declaration set out above, and in his evidence. What the Tribunal does not accept is that the review applicant was given the opportunity to explain that at hearing and failed to do so, other than to say that the parties travelled to the visa applicant's mother's house to notify her of their intention to marry.
60. Initially at hearing the review applicant stated that the visit to the visa applicant's mother was in July 2016. Later in the hearing he stated that it was in January 2017, which in fact was when the parties were married. The statutory declaration made by the review applicant dated 11 December 2019 states that the visit to the visa applicant's mother, to notify her of their impending marriage, took place in July 2016. The Tribunal accepts that the review applicant may have been nervous and experiencing pressure at the hearing. The Tribunal does not accept that any such nerves or pressure would account for the wide variation in dates relevant to the proposal, and particularly as they pertain to the date of the visit to the visa applicant's mother to notify her of their marriage, nor his failure to properly explain the evolution of the parties plans to marry.

61. *Where the parties stayed and when*

62. The parties gave a number of versions as to where they stayed during the trips made by the review applicant to Vietnam. The review applicant initially stated that during his second visit to Vietnam on 7 July 2016 he took the visa applicant and her daughter to his home-town of Ca Mau. He subsequently stated that during that visit he stayed in Ho Chi Minh City, and that the parties visited the visa applicant's mother.
63. The Tribunal established that during all of the visits by the review applicant to the visa applicant in Vietnam, the visa applicant was living above the café she was running. The Tribunal asked the review applicant why he did not stay there with the visa applicant. His response was that he had stayed there "just the first day" he visited her. When the Tribunal sought to clarify that with the review applicant, he confirmed that was on the night of 12 May 2016. Later during the hearing, the review applicant stated that he stated his wife's place during the visit commencing on 12 January 2017.
64. When the Tribunal asked of the visa applicant where the review applicant stayed during his visit to Vietnam commencing on 12 January 2017, initially she said that he lived at her place. Subsequently she said that on that visit they went to a hotel in Ho Chi Minh City, and to her mother's house. When asked about the visit commencing on 13 October 2017 the visa applicant said that the review applicant stayed with her at the café.
65. The Tribunal noted that there had been a number of versions of where the parties had stayed, and that the review applicant's and visa applicant's versions were not consistent. The Tribunal put this information to the review applicant in accordance with the procedure set out in s.359AA of the Act, telling the review applicant that had some information which would, subject to his comments or response, either reason, or part of the reason for affirming the decision under review to refuse to grant the visa. The Tribunal confirmed that it had not made up its mind, and it explained to the review applicant that after it had explained the information to him he was entitled to seek additional time to comment upon or respond to the

information, and that if he so wished to seek additional time he should ask and the Tribunal would consider his request. The review applicant indicated that he would like his representative to make submissions regarding this issue, and the Tribunal acceded to that.

66. In his statutory declaration of 11 December 2019 review applicant stated that there were two occasions upon which the parties stayed together at the café at which the visa applicant worked. They were between 15 and 20 January 2017, and 6 and 9 February 2017. The review applicant went on to say that at all other times he and the visa applicant stayed either in an hotel in Ho Chi Minh City, and in Ca Mua, or at the visa applicant's mother's house. As already canvassed, the Tribunal notes that at the beginning of this statutory declaration the review applicant states that he was suffering from extreme nerves and pressure facing the Tribunal for the first time.
67. While the Tribunal is prepared to accept that the parties moved around a lot, and that they may not have a complete recollection of exactly where they stayed and when over a number of visits by the review applicant to Vietnam to visit the visa applicant, the Tribunal does not consider that the nerves of the review applicant, and any pressure he may have felt explain why he would have stated at hearing that he stayed with the visa applicant at the café at which she worked only once, on the night of 12 May 2016, and provide substantially different versions later in the hearing and in his statutory declaration of 11 December 2019. Furthermore, the Tribunal notes that the review applicant's subsequent statutory declaration, which purports to explain the inconsistencies in the evidence regarding where the parties stayed provides no explanation as to why the visa applicant told the Tribunal that the review applicant stayed with her at the café during both the visits in 2017..

68. *The visa applicant's address*

69. The Tribunal noted from the material before it, that the visa applicant provided her address as being that of her ex-husband's address in a number of documents including some prepared three years after her divorce.
70. The Tribunal had regard to the delegate's decision, a copy of which was before it, and asked the review applicant why the visa applicant provided her address in the Household Registration Book as at 6 July 2016 as that of her ex-husband, when she had been divorced since 21 March 2014. The review applicant stated that the visa applicant's name was still on the same household register as that of the ex-husband because the property settlement hadn't yet finalised.
71. Upon further questioning by the Tribunal regarding the visa applicant's property, he stated that the visa applicant and her ex-husband had agreed that the property would not be sold or split but would be kept as an estate for their daughter. When asked why, if that were the case, he had said that the property settlement had not been finalised, he responded that the divorce was in 2014 but that he knew that the visa applicant had moved to the café in January 2013 as her ex-husband had gone off with another woman leaving the house vacant.
72. The Tribunal also asked the visa applicant about her household registration. She stated that she had been told by her solicitor to put that address on the form (presumably the household registration) because she "belonged to that household", and when the visa applicants' evidence in that regard was raised with the review applicant, pursuant to the provisions of s.359AA of the Act, the review applicant also stated that the visa applicant placed her previous address on the household registration booklet on the basis of the advice she had received from her solicitors in Vietnam. He said that the visa applicant had been living in domestic violence and had moved out and that she definitely did not live at that address. He

went on to say that the solicitors in Vietnam advised her to put that address because her name was still attached to it.

73. The Tribunal noted with the review applicant it's concerns regarding the visa applicant providing her address on her household registration as that of her ex-husband's, when on the evidence of the parties she had moved out of the house in January 2013, and had, since then, been living at the coffee shop at which she worked, until some period in 2018 when she moved to Ho Chi Min City.
74. The Tribunal also showed the review applicant a copy of the Form 40 SP "Sponsorship for a partner to migrate to Australia", which he had completed, and which included that the visa applicant's address was that of her ex-husband's. The Tribunal noted that the review applicant knew that the visa applicant lived at the Dat Café as he had visited her there many times, including meeting her there on 12 May 2016. He responded that the visa applicant uses that address because her name is attached to that household, so she can use that address legally. The Tribunal told the review applicant that these were documents for Australia, and it assumed he would have known that it is important to fill out Australian government documents correctly. The review applicant then responded that he used this address as the visa applicant had provided it to him.
75. During the discussion regarding the visa applicant's address on the Household Registration Form, the review applicant asked for a short adjournment. When the hearing recommenced, the review applicant said it was the visa applicant's old address on the form, she had moved to the café and she belonged to that household so she could use the address. He said "she has to wait there four years to transfer her name to the new household. So that is why the solicitor just advised to put the address as the ex-husband's address". The Tribunal put to the review applicant that, as was reflected in the delegate's decision, this was not the reason the visa applicant had offered when asked about this in the interview with the Department officer on the 6 December 2017 when she stated that in July 2012, she decided to register her own Household Registration Booklet as it was difficult to borrow the old household registration booklet from her ex-spouse.
76. The Tribunal also noted, having regard to the delegate's decision, that the address in the household registration had also been discussed with the visa applicant at the departmental interview. According to the delegate's decision, in interview the visa applicant "advised that the reason for registering a new Household Registration Booklet in July 2016 is because she had difficulties in borrowing the old Household Registration Booklet from her ex-spouse". When asked to explain the existence of a further version of reasons for the visa applicant using her ex-husband's address the review applicant made no response.
77. The Tribunal considers that the parties both state that the visa applicant lived at the Dat Café following her divorce and yet they both continued to use her ex-husband's address on all official documents for some three and a half years following the divorce. The Tribunal does not find their conflicting and varying versions of why she continued to use this address as plausible. There is no independent evidence that the visa applicant lived at the Dat Café, or as now claimed, in Ho Chi Minh city and yet there are official documents completed by the parties that show her living at an address as that of her ex-husband's
78. *Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses*
79. The review applicant provided 11 money transfer receipts with the original application that showed a total of AU\$2806 had been sent to the visa applicant between 4 October 2016 and 19 November 2017. Two further money receipts were provided, dated 8 December 2019 for

\$386 and 5 January 2020 for \$382. It is noted that both these receipts were for transfers made between the first and second hearings.

80. The review applicant has provided two hotel receipts showing the couple stayed in Ho Chi Minh City from 17 May to 21 May 2018 and 24 April to 28 April 2018 although it is not clear that the review applicant paid for the accommodation; however, the Tribunal accepts that since he sent the receipts he was the one who paid for the accommodation.
81. The review applicant also claims that he has paid for hotels on the other occasions that the couple have stayed together in Vietnam, although no documentary evidence of this expenditure has been provided.
82. The review applicant claimed to have spent AU\$1000 on the wedding celebrations but no documentary evidence of this expenditure has been provided.
83. In his statutory declaration of 27 November 2019, the review applicant claimed that his wife told him not to send her money as they need to make savings for the date of reunion, however, he said as the husband he has from time to time sent some money to help her have a better standard of living.
84. In the hearing on 5 December 2019, the review applicant said that he sends 6 million Vietnamese Dong or AU\$372 per month “*quite regularly up until now*” to the visa applicant by the Bao Bao money service. The visa applicant also stated that he sends her this amount a month. Notwithstanding the parties’ claims at hearing, the Tribunal notes that there is no documentary evidence before it of money transfers occurring between November 2017 and December 2019.
85. The parties do not share joint ownership of assets, nor joint liabilities and there was no evidence provided to the Tribunal of any legal obligation owed in respect of the other person. They have pooled their financial resources to the extent of claimed expenditure by the review applicant on accommodation, wedding catering and monthly transfers to the visa applicant.
86. The Tribunal recognises that due to both parties living in different countries, evidence of the financial aspects of the relationship are limited. It places some weight on the review applicant’s expenditure on airfares to Vietnam on five occasions up to May 2018; his claimed payment for the wedding, accommodation and some monthly transfers of money to the visa applicant.
 - *Nature of the household – including any joint responsibility for care and support of children; parties’ living arrangements; and any sharing of housework*
87. All the children of the parties are adults and leading independent lives, so there is no joint responsibility for the care and support of children. The parties claim to have spent a night together on the day they met, namely 12 May 2016, although the review applicant has offered different versions of this day.
88. On the visit by the review applicant from 7 to 27 July 2016, the parties claim to have stayed together at the Phuong Thanh Binh hotel in Ho Chi Minh City. They also claim that during this visit, they went to visit the review applicant’s brother and sister in Ca Mau and stayed in the San Song Hung Hotel in Ca Mau and visited the visa applicant’s mother in Tien Giang. As they mostly stayed in hotels there was no opportunity to share household tasks, although they dined out together.

89. On the visit by the review applicant from 12 January to 16 February 2017, the parties again claimed to have stayed at the Phuong Thanh Binh hotel in Ho Chi Minh City but also travelled a good deal making wedding preparations.
90. As is set out above, on the visit by the review applicant from 12 October to 9 November 2017, the parties cannot agree on where they stayed as the review applicant states they stayed in the Phuong Thanh Binh Hotel in Ho Chi Minh City because the city is more vibrant and they could visit his nephews and the visa applicant's daughter, while the visa applicant stated that they stayed together at the Dat Café.
91. In respect of the visit by the review applicant from 24 April to 22 May 2018, receipts for accommodation for the parties at the Hoi An Hotel from 25 to 28 April and 17 May to 21 May 2018 were provided.
92. The Tribunal puts weight on the couple having spent 13 and a half weeks living together and accepts that since most of this was in hotels, there was little opportunity for shared housework, although the parties did dine out together and with others. Since the parties live in different countries the Tribunal accepts that evidence in relation to a shared household is likely to be limited.
- *Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities*
93. The parties have provided over 60 photographs, including photographs of them together and with others in a variety of settings, including at their wedding.
94. The parties gave evidence that they engaged in a number of social activities together when the review applicant visited Vietnam including visiting a famous bridge, a theme park, temples, their families and other activities.
95. The parties also demonstrated a knowledge of one another's family members. For example, the review applicant gave evidence that his brother and sister had met the visa applicant many times and in his statutory declaration of 12 February 2017 stated that they were "joyful and agreed" when he told them of his impending marriage, and the visa applicant demonstrated knowledge of the review applicant's brothers circumstances in terms of his health and some of the arrangements pertaining to his care. The review applicant similarly demonstrated knowledge of the visa applicant's mother's age and health, namely that she is 82 years old and very frail, requiring regular medical check-ups at the hospital.
96. The review applicant has three children, two sons (the older of whom is married) who reside with their mother in a suburb about five minutes away from where he lives. He also has a daughter who lives in Melbourne. He claims that they are all aware of the marriage and happy for their Dad but did not have time to attend the wedding nor write letters in support of the relationship. He sees his sons most weekends and is in regular telephone contact with them. He told the Tribunal that one of his sons drove him to at least one of the Tribunal hearings.
97. The evidence was that the visa applicant has never spoken with the review applicant's children in Australia and the reason given was that they speak only English and no Vietnamese, and the visa applicant only speaks Vietnamese. In the second hearing, the review applicant advised that the mother of his children, who lives with her two sons and the eldest son's wife cannot speak English and it became clear that the children are able to

“speak in Vietnamese”. As set out above the review applicant gave conflicting and implausible evidence in relation to this matter.

98. The visa applicant has a daughter who attended the airport with her mother on various occasions to collect the review applicant, went on outings with the parties and attended their marriage. The review applicant told the Tribunal that the visa applicant hoped to sponsor her daughter to come to Australia. Between the first and second hearings the review applicant provided a statutory declaration to the Tribunal from the visa applicant's daughter, dated 12 January 2020, which provides substantial support for the parties' relationship, stating, amongst other things, that the review applicant loved the visa applicant very much and that he sees her as his own daughter. The marriage was held at the home of the visa applicant's mother, and the parties visited her previous to their marriage.
99. The Tribunal places some limited weight on the evidence that the parties have attended social occasions including their wedding as a couple and with others, have socialised with at least some members of each other's families who are located in Vietnam, enjoy the support of the visa applicant's daughter for their relationship, in accordance with their oral evidence and supported by her written statutory declaration and their claims that other members of their families support them. However this is offset by the concern the Tribunal has that there are no statutory declarations or letters of support from any family members or friends of the review applicant in either country, nor of the visa applicant other than that of her daughter, provided after the first hearing. When the Tribunal asked the review applicant about this he explained that their lawyer in Vietnam did not tell them they needed to provide this sort of evidence. Even if that is the case the matter was raised at the first hearing on 6 December 2019, and as at April 2020 the only document of support forthcoming has been from the visa applicant's daughter in circumstances where the parties have referred to a large number of family members being supportive of their relationship including the review applicant's brother and sister and his three children and the visa applicant's mother.
100. The social aspects of the relationship are further undermined by the absence of statutory declarations or letters of support from any friends of either party in circumstances where the review applicant claimed that about 50 people attended the wedding. It is particularly undermined by the evidence that the visa applicant has never spoken to the review applicant's children, given that it was ultimately established that they speak Vietnamese and therefore would have been able to communicate with the visa applicant.
101. The visa applicant was asked why there were no letters of support from family and friends for the couple's relationship and she stated that the migration agent in Vietnam who assisted with the visa application did not advise them to do so. That application was lodged in May 2017 and it is now two and a half years later, and, as already canvassed the only letter in support of the marriage as genuine is the visa applicant's daughter's statement which was provided after the first hearing.
102. Accordingly, overall the Tribunal places little weight on the evidence of the social aspects of the relationship.
103. *Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term*
104. The relationship commenced in July 2016 or some three and a half years ago, and in that time the parties have lived together for 13 and a half weeks. The Tribunal places weight upon these factors.

105. The review applicant provided his Optus phone records, which showed he phoned the visa applicant daily until June 2018, when the frequency dropped to weekly phone calls. The Tribunal places weight on the parties' regular telephone calls and considers it demonstrates the parties draw a degree of companionship and emotional support from one another.
106. The Tribunal notes that the visa applicant demonstrated knowledge of the review applicant's family in Vietnam and Australia and was also able to describe the review applicant's health problems. She stated that he is old and that she wishes to take care of him. On his part, the review applicant gave evidence which reflected an understanding of the health problems experienced by the visa applicant's mother, and that he helped the visa applicant at the café by making coffee.
107. The Tribunal is concerned that the visa applicant, despite claiming to have divorced her husband in 2014 and moved out of the family home and into the café, continued to list her ex-husband's address as her residential address on official documents in Vietnam and on official documents for Australia. It is claimed that she lived at the Dat Café and has now moved to live in Ho Chi Minh City, but there is no evidence to support these claims.
108. The review applicant and the visa applicant claim to see the relationship as long term, however, when asked about their future plans, both parties' evidence was vague and general – reunite, get job and look after the review applicant. Further when asked about their intentions in the event that the visa is not granted the review applicant said that they would be "very upset" and "not know what to do", but ultimately said "that if we can't reunite then we have to accept that".
109. Overall the Tribunal accepts that the parties were married in Vietnam in 2017 and that the review applicant in particular has made a financial contribution to the relationship by way of paying for airfares and accommodation to visit the visa applicant and sending her money on at least 13 occasions. Tribunal notes that the review applicant also claims to have paid for the wedding and the visa applicant states that the review applicant has sent money regularly, over and above that which is covered by the 13 money transfer receipts, but there is no documentary evidence in support of that.
110. As set out above, the Tribunal also notes the evidence of the parties that they stayed together and dined out together and accepts that the evidence in relation to both financial aspects of the relationship and the nature of the household is likely to be limited due to the parties living in separate countries.
111. The Tribunal places little weight on the social aspects of the relationship, as apart from a bundle of photographs and a statutory declaration from the visa applicant's daughter, there is no independent evidence whatsoever of the social aspects of the relationship in circumstances where the review applicant claims that all of his family are supportive of the relationship and the visa applicant claims that in addition to her daughter, her mother is also supportive of the relationship. Further, the review applicant claims around 50 people attended the wedding. In those circumstances, the Tribunal would have expected there to be far more corroborative evidence of the social aspects of the relationship, including letters of support or statutory declarations confirming that they represent themselves to others as being married, and providing opinions of friends and acquaintances as to the nature of the relationship. As to whether the parties plan and undertake joint social activities, the Tribunal accepts that the photographs and hotel receipts amount to some limited evidence of that.
112. As to the nature of the parties' commitment to each other, the Tribunal places some weight on the regular telephone contact between them, the duration of their relationship and the parties' knowledge of each other and their families. However, in terms of whether they see the relationship as long-term, the Tribunal notes the review applicant stated that if the visa

application is refused, they would have to accept it and advanced no plans to pursue the relationship further.

113. On balance the evidence of all of the circumstances of the relationship is weak. This is compounded by the numerous inconsistencies within the evidence of the review applicant and between the review applicant and visa applicant in relation to such matters as when they visited the visa applicant's mother (related to the proposal), where they stayed on the review applicant's visits to Vietnam, and when, and the ongoing use by the visa applicant of her ex-husband's address as her place of residence. Further, as set out above, when these matters were put to the review applicant, they are either not explained or the explanation was implausible or gave rise to further inconsistencies.
114. For these reasons, having had regard to all the circumstances of the relationship set out above, including the r.1.15A(3) matters to which it is required to have regard, the Tribunal is not satisfied that the parties are in a genuine and continuing relationship. It is also not satisfied that have a mutual commitment to a shared life as a married couple to the exclusion of all others nor that they are not living separately and apart on a permanent basis.
115. For completeness, the Tribunal notes that a number of other matters, such as the date upon which the visa applicant obtained a passport, and the reasons why, were traversed at hearing, but the matters which were determinative in this review are limited only to those canvassed earlier within these reasons.
116. It follows that the Tribunal is not satisfied that the parties are in a married relationship, as that term is defined in s.5F(2) of the Act.
117. For the reasons above, the Tribunal is not satisfied that the requirements of s.5F(2) are met, that is, that the parties were in a married relationship, either at the time of the visa application or are now, at the time of this decision. It follows that the visa applicant was not the spouse of the review applicant at the time of the visa application as required by cl.309.211(2) and does not continue to satisfy the criteria in cl.309 as required by cl.309.221.
118. Therefore, the visa applicant does not meet cl.309.211 or cl.309.221 as required.
119. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

120. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

De-Anne Kelly
Member

Fiona Meagher
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).